

June 2007

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## In-House News

### IRPM Appoints Brethertons as Honorary Solicitors

Brethertons LLP has been appointed as honorary solicitors to the Institute of Residential Property Management (IRPM). The IRPM was launched by the Association of Residential Managing Agents (ARMA) to provide professional qualifications in residential property management to anyone working in the sector.

Brethertons has considerable experience of providing legal services to the property management industry and provides regular professional development opportunities to the IRPM through a variety of seminars, webinars and newsletters.

Shaun Jardine, Partner at Brethertons said, "We are delighted by our appointment since we know the IRPM provide an extremely valuable service to members of the property management industry. We are pleased to be able to support them in developing the careers of people within this industry."

Shaun and Caroline Lee (Head of Brethertons' Property Management Debt Recovery Department) will be formally introduced to IRPM members at their AGM in London on 12th September 2007.

### Laura Bennett

The debt recovery team continues to grow with the arrival of Laura Bennett as a property management assistant. Laura is a law and business studies graduate, and has completed her post graduate diploma in legal practice.

## Property ManagerFILE Special Report

### Do you demand Service Charges and Administration Charges from tenants?

#### Are you ready for the new rules?

1st October 2007 is a date that all Landlords & Managing Agents should have in their diaries. From this date, all Landlord and Managing Agents will be required to serve a summary of rights and obligations of tenants of dwellings in relation to service charges, with any demand for service and/or administration charges.

#### Why do summaries have to be served?

Service charge payers are entitled to be confident that the money they pay towards the upkeep of their building is held properly and that it is being used for the purpose it is provided for. Whilst most leaseholders receive sufficient information about their service charges, some leaseholders are, however, not so lucky! The Regulations have therefore been designed to ensure tenants are treated equally, consistently and are aware of their rights.

#### Form and content of the summary:

Section 21B of the Landlord and Tenant Act 1985 (inserted by Section 153 of the Commonhold and Leasehold Reform Act 2002) enables the Secretary of State to prescribe the form and content of summaries of rights and obligations of tenants of dwellings in relation to service charges.

The Secretary of State has recently published the prescribed form and content of these summaries in Regulations:

- The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 - for Service Charge Demands; and

- Administration Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007 - for Administration Charge Demands.

The content is of a similar form to the summary of rights and obligations that must be served with statements of account and more detail on what must be included is set out below.

## Consequences of non-compliance

A tenant who has not been served with such a summary may withhold payment. Furthermore, under the new Section 21B provisions, any clauses of the lease relating to non-payment or late payment have no effect during the period that the tenant withholds service charges.

Further, there is no provision for a landlord to ask a Leasehold Valuation Tribunal to dispense with the requirement to serve summaries.

This, therefore, seems to mean that if a tenant is validly withholding service charges, the only recourse for the landlord would be to serve another demand with an accompanying summary. In other words, it is essential that the new form of service charge and/or administration demand is incorporated into the existing administrative system and procedures used by Landlords and Managing Agents.

## When do the regulations come into force?

The Regulations come into force on 1st October 2007.

But what happens if the first demand was served before 1st October 2007? If the first demand is served on the tenant before 1st October 2007 and the service charges must be paid before this date, there is no requirement to include the tenant's rights and obligations.

If, however, the first demand was served before 1st October 2007 in respect of service charges which are due for payment after 1st October 2007, then the summary of rights and obligations must be included.

## Administration charge:

Prior to the 2002 Act there was also widespread concern and complaint about landlords who impose administration charges which are unreasonable in relation to any costs involved, but which were pitched at a level which

discouraged leaseholders from incurring the risk of costs in court proceedings. To deter such abuses and to give tenants a more cost effective remedy, provision was made in the 2002 Act for LVTs to deal with disputes about administration charges.

Provision was also made in the 2002 Act requiring landlords to inform their tenants of their rights and obligations in relation to administration charges by way of a summary. This must accompany any demand for payment of administration charges, similar to those in respect of service charge demands.

## So, how should things be set out?

### 1. Service charge:

The regulation states that a demand for the payment of service charges must be legible in a typewritten or printed form of at least ten point, and it must contain:

- a) the title "Service Charges - Summary of tenant's rights and obligations"; and
- b) the following statement:

- (1) This summary, which briefly sets out your rights and obligations in relation to variable service charges, must by law accompany a demand for service charges. Unless a summary is sent to you with a demand, you may withhold the service charge. The summary does not give a full interpretation of the law and if you are in any doubt about your rights and obligations you should seek independent advice.
- (2) Your lease sets out your obligations to pay service charges to your landlord in addition to your rent. Service charges are amounts payable for services, repairs, maintenance, improvements, insurance or the landlord's costs of management, to the extent that the costs have been reasonably incurred.
- (3) You have the right to ask a Leasehold Valuation Tribunal to determine whether you are liable to pay service charges for services, repairs, maintenance, improvements, insurance or management. You may make a request before or after you have paid the service charge. If the tribunal determines that the service charge is payable, the tribunal may also determine:

- who should pay the service charge and who it should be paid to
- the amount
- the date it should be paid by; and
- how it should be paid.

However, you do not have these rights where:-

- a matter has been agreed or admitted by you
- a matter has already been, or is to be, referred to arbitration or has been determined by arbitration and you agreed to go to arbitration after the disagreement about the service charge or costs arose; or
- a matter has been decided by a court.

(4) If your lease allows your landlord to recover costs incurred or that may be incurred in legal proceedings as service charges, you may ask the court or tribunal, before which those proceedings were brought, to rule that your landlord may not do so.

(5) Where you seek a determination from a Leasehold Valuation Tribunal, you will have to pay an application fee and, where the matter proceeds to a hearing, a hearing fee, unless you qualify for a waiver or reduction. The total fees payable will not exceed £500, but making an application may incur additional costs, such as professional fees, which you may also have to pay.

(6) A Leasehold Valuation Tribunal has the power to award costs, not exceeding £500, against a party to any proceedings where:

- it dismisses a matter because it is frivolous, vexatious or an abuse of process; or
- it considers a party has acted frivolously, vexatiously, abusively, disruptively or unreasonably.

The Lands Tribunal has similar powers when hearing an appeal against a decision of a Leasehold Valuation Tribunal.

(7) If your landlord:

- proposes works on a building or any other premises that will cost you or any other tenant more than £250; or
- proposes to enter into an agreement for works or services which will last for more than 12 months and will cost you or any other tenant more than £100 in any 12 month accounting period; or

- your contribution will be limited to these amounts unless your landlord has properly consulted on the proposed works or agreement or a Leasehold Valuation Tribunal has agreed that consultation is not required.
- (8) You have the right to apply to a Leasehold Valuation Tribunal to ask it to determine whether your lease should be varied on the grounds that it does not make satisfactory provision in respect of the calculation of a service charge payable under the lease.
- (9) You have the right to write to your landlord to request a written summary of the costs which make up the service charges. The summary must:
- cover the last 12 month period used for making up the accounts relating to the service charge ending no later than the date of your request, where the accounts are made up for 12 month periods; or
  - cover the 12 month period ending with the date of your request, where the accounts are not made up for 12 month periods.

The summary must be given to you within one month of your request or six months of the end of the period to which the summary relates whichever, is the later.

- (10) You have the right, within six months of receiving a written summary of costs, to require the landlord to provide you with reasonable facilities to inspect the accounts, receipts and other documents supporting the summary and for taking copies or extracts from them.
- (11) You have the right to ask an accountant or surveyor to carry out an audit of the financial management of the premises containing your dwelling, to establish the obligations of your landlord and the extent to which the service charges you pay are being used efficiently. It will depend on your circumstances whether you can exercise this right alone or only with the support of others living in the premises. You are strongly advised to seek independent advice before exercising this right.

- (12) Your lease may give your landlord a right of re-entry or forfeiture where you have failed to pay charges which are properly due under the lease. However, to exercise this right, the landlord must meet all the legal requirements and obtain a court order. A court order will only be granted if you have admitted you are liable to pay the amount or it is finally determined by a court, tribunal or by arbitration that the amount is due. The court has a wide discretion in granting such an order and it will take into account all the circumstances of the case.

## 2. Administration charges:

The summary of rights and obligations which must accompany a demand for the payment of an administration charge must be legible in a typewritten or printed form of at least ten point, and must contain:-

- (a) the title "Administration Charges - Summary of tenant's rights and obligations"; and
- (b) the following statement:
- (1) This summary, which briefly sets out your rights and obligations in relation to administration charges, must by law accompany a demand for administration charges. Unless a summary is sent to you with a demand, you may withhold the administration charge. The summary does not give a full interpretation of the law and if you are in any doubt about your rights and obligations you should seek independent advice.
- (2) An administration charge is an amount which may be payable by you as part of or in addition to the rent directly or indirectly:
- for or in connection with the grant of an approval under your lease, or an application for such approval
  - for or in connection with the provision of information or documents
  - in respect of your failure to make any payment due under your lease; or
  - in connection with a breach of a covenant or condition of your lease.

If you are liable to pay an administration charge, it is payable only to the extent that the amount is reasonable.

- (3) Any provision contained in a grant of a lease under the right to buy under the Housing Act 1985, which claims to allow the landlord to charge a sum for consent or approval, is void.
- (4) You have the right to ask a Leasehold Valuation Tribunal whether an administration charge is payable. You may make a request before or after you have paid the administration charge. If the Tribunal determines the charge is payable, the tribunal may also determine:
- who should pay the administration charge and who it should be paid to
  - the amount
  - the date it should be paid by; and
  - how it should be paid.

However, you do not have this right where:

- a matter has been agreed to or admitted by you
  - a matter has been, or is to be, referred to arbitration or has been determined by arbitration and you agreed to go to arbitration after the disagreement about the administration charge arose; or
  - a matter has been decided by a court.
- (5) You have the right to apply to a Leasehold Valuation Tribunal for an order varying the lease on the grounds that any administration charge specified in the lease, or any formula specified in the lease for calculating an administration charge is unreasonable.
- (6) Where you seek a determination or order from a Leasehold Valuation Tribunal, you will have to pay an application fee and, where the matter proceeds to a hearing, a hearing fee, unless you qualify for a waiver or reduction. The total fees payable to the tribunal will not exceed £500, but making an application may incur additional costs, such as professional fees, which you may have to pay.
- (7) A Leasehold Valuation Tribunal has the power to award costs, not exceeding £500, against a party to any proceedings where:

- it dismisses a matter because it is frivolous, vexatious or an abuse of process; or
- it considers that a party has acted frivolously, vexatiously, abusively, disruptively or unreasonably.

The Lands Tribunal has similar powers when hearing an appeal against a decision of a Leasehold Valuation Tribunal.

(8) Your lease may give your landlord a right of re-entry or forfeiture where you have failed to pay charges, which are properly due under the lease. However, to exercise this right, the landlord must meet all the legal requirements and obtain a court order. A court order will only be granted if you have admitted you are liable to pay the amount or it is finally determined by a court, a tribunal or by arbitration that the amount is due. The court has a wide discretion in granting such an order and it will take into account all the circumstances of the case.

#### Summary:

- In order to avoid a breach of the regulations, the relevant statement detailed above should be incorporated into all demands for service charges or administration charges from the 1st October 2007.
- Beware that where service charges are demanded in advance, if the original demand was sent before the 1st October 2007 and a further demand is sent after this date requesting payment of charges on or after the 1st October 2007, the statement of rights and obligations must be incorporated.
- In respect of administration charges, all demands sent on or after the 1st October 2007 must incorporate the statement of rights and obligations.
- Familiarise yourself with the statements, as it is inevitable that tenants will query the same in an attempt to avoid making payment.
- And REMEMBER: If the summaries are not incorporated into demands, the tenant may be entitled not to pay the charges and any provisions relating to late or non-payment will not take effect.

## Compliance with these new rules is essential!

### Do you take deposits from tenants? Will you be breaking the law?

The 6th April 2007 is a date all Landlords should have had in their diaries. From this date, all deposits taken by landlords under assured shorthold tenancies have to be protected by one of the Government-approved tenancy deposit protection schemes.

### What is the tenancy deposit protection scheme?

The Government has introduced the scheme to protect tenancy deposits. The scheme is also intended to provide a fairer system for settling disputes about the return of deposits at the end of the tenancy. Before the scheme, if the Landlord kept all or part of the deposit, it could be difficult on the whole to get it back. The scheme is therefore intended to protect tenants from rogue landlords who refuse to return all or part of their deposits at the end of the tenancy.

### Types of schemes

There are two types of tenancy deposit protection schemes for landlords:

- 1) the custodial-based scheme and 2) the insurance-based scheme.
- Under the custodial scheme, the landlord must pay the deposit to the scheme. The deposit then stays with the scheme until the end of the tenancy agreement. If, at the end of the tenancy, there is a dispute over damage, amounts etc. the scheme will hold the amount until the dispute resolution service or Courts decide what is fair.
  - Under the insurance-based scheme, the landlord will keep the deposit, but in return will pay an insurance premium to the scheme. In other words, the deposit is insured and if there is any dispute at the end of the tenancy over damage, amounts etc, the scheme will repay to the tenant the agreed amount directly. The insurance scheme can charge fees to landlords for membership and can also require contributions towards the costs of insurance.

### Whose responsibility is it - landlord or letting agent?

Landlords relying on letting agents to ensure that their deposits are protected in accordance with the law from the 6th April, should take heed. Compliance with the new rules is the personal responsibility of the Landlord and not the letting agent.

### Which scheme to use?

This will be the decision of the Landlord and their letting agent. In either case however, the Landlord is required to furnish the tenant with certain information within 14 days from the date on which the deposit is paid. The information that must be provided include:

- The contact details of the tenancy deposit scheme selected
- The landlord or agent's contact details
- How to apply for release of the deposit
- Information explaining the purpose of the deposit; and
- What to do if there is a dispute about the deposit.

### What happens if landlords do not comply?

If the landlord does not protect the deposit in one of the two schemes and does not provide the required information within the 14 day time period, the tenant will be entitled to apply to the County Court for an order that the landlord or agent pay the deposit back to the tenant, or protect it in one of the tenancy deposit protection schemes.

The court also has power to order a landlord who fails to protect a deposit to pay it into the custodial scheme and to hand over to the tenant three times the amount of the deposit.

The Landlord should also be aware that unless and until the deposit has been protected under one of the protections schemes, they will also be unable to regain possession of the property using notice only under Section 21 of the Housing Act 1998.

The consequences of non-compliance for the Landlord can therefore be very severe.

## When did the scheme come into force?

These new rules apply from the 6th April 2007 to all assured shorthold tenancies created on or after this date throughout England and Wales. Although the new rules do not have retrospective effect, for tenancies and renewal agreements signed on or after the 6th April 2007, short of not taking a deposit, there will be no escape!

## Landlord need not repair item not in disrepair

A tenant, who sought to claim from her landlord, after she was cut by broken glass, found that the Court of Appeal did not agree that her landlord was liable for her injury.

Elaine Alker had been injured when the glass in her front door broke, causing a serious injury to her arm. The glass concerned was ordinary glass, not safety glass. She argued that the glass, which was undamaged up to that time, should have been replaced with safety glass, as the dangers of using un-reinforced glass in doors is well known and has been so for many years. She argued that her landlord's failure to replace the glass was a breach of his duty under s.4 of the Defective Premises Act 1972.

In court, it was ruled that the landlord, Collingwood Housing Association, was in breach of its obligations. The Housing Association appealed.

The Court of Appeal did not agree with the finding of the lower court. The door panel itself was not in disrepair and thus needed no maintenance. Although there was a repairing covenant in the tenancy agreement, the landlord's duty was to maintain or repair the premises, which is not the same as a duty to keep them safe. That would be an unjustified extension of the statutory language.

## Unpaid rent claim - landlord need not mitigate loss

A common principle in English law is that of mitigation. This means that in cases involving a claim for damages, the person who has suffered the loss for which compensation is being sought is expected to take reasonable steps to minimise that loss.

For example, if a digger driver were to accidentally demolish the wall of a building, the owner of the building would be expected to take reasonable steps to make sure that the open area was covered to prevent rain entering, thereby causing further loss, and to do so within a reasonable period of time. If the owner of the building failed to do so and this led to further damage, this would not be regarded by the court as being primarily the fault of the digger driver.

Recently, a case involving landlords and tenants in Hampshire showed that the duty to mitigate one's loss is not absolute.

The tenants were a professional firm which rented offices from the landlords. When they decided to cease practising, the tenants vacated their offices and stopped paying the rent due under the lease. The landlords took no steps to repossess or re-let the property and sued the tenants for the unpaid rent.

The tenants argued that by not instructing estate agents to find a new tenant, the landlords had failed to mitigate their loss. However, the Court of Appeal could not accept their argument.

The Court considered that had the landlords repossessed the property, their claim would have been (at least in part) a claim for damages. In that case they would have been compelled to mitigate their loss. However, what they did instead was simply to sue the tenants for the unpaid rent, which was not an unreasonable action to take and which (crucially) was not a claim for damages, but for the payment contractually due under the lease. The tenants were therefore liable for the balance of the unpaid rent under their lease.

This case has implications for landlords and for tenants. Tenants who wish to vacate premises before the end of their lease would be well advised to negotiate the surrender of the lease with their landlords, or at least agree a strategy for finding a new tenant.

Landlords faced with tenants who vacate their premises in similar circumstances should consider carefully whether they should repossess the premises or sue for the unpaid rent. Normally, this will be a practical decision based on the likelihood of being paid even if successful in the claim and the ease of re-letting the premises.

## New business lease code

A new Code for Leasing Business Premises has now been agreed.

We are sometimes surprised people do not take legal advice on commercial leases when if they were moving house they would tend to use a lawyer. The new Code has resulted from collaboration between commercial property professionals and industry bodies representing both owners and occupiers. The Code is divided into three parts:

- Ten point requirements for landlords in order for their lease to be Code-compliant
- a guide for occupiers, explaining terms and providing helpful tips; and
- a model Heads of Terms (which can be completed on line and downloaded).

No one is obliged to follow the code and not all landlords will want to offer code compliant leases, however the Government is keen to encourage people to follow the code. [www.commercialeasecode.co.uk/landlord-code.html](http://www.commercialeasecode.co.uk/landlord-code.html)

## Beware New Email Scam

HM Revenue and Customs (HMRC) has warned of a new 'phishing' scam which attempts to obtain the bank account details of taxpayers.

The way the scam works is that an email is sent to the taxpayer, purporting to be from HMRC, advising them of a 'tax overpayment' for which a refund is due. The taxpayer is asked to supply their bank account details so the refund can be made.

HMRC has issued a statement reminding taxpayers that they neither communicate nor request taxpayer-specific information by email as a matter of policy.

**In a document as concise as PropertyManagerFILE it is impossible to give a complete answer to all facets of any legal problem. Treat PropertyManagerFILE as food for thought, but don't take any action based on its advice unless you have seen a solicitor. ©2007.**

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